

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 933 of 1995

WITH

CRIMINAL MISC. APPLICATION NO. 1217 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

KUMBHAR VIJANAND BHAGWAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 933 of 1995
MR RD DAVE for Petitioner No. 1
MR ASIM PANDYA for HL PATEL ADVOCATES for Petitioners
MR IM PANDYA, APP for Respondent No. 1
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CORAM : MR.JUSTICE M.H.KADRI
and

Date of decision: 27/02/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. The appellants have preferred this appeal for challenging their conviction under Sections 302 and 201 of the Indian Penal Code (for short 'IPC') recorded by the learned Sessions Judge, Junagadh in Sessions Case No. 119/1993 vide judgment dated 31st August, 1995. The learned Judge has imposed sentence of imprisonment for life for offence u/S. 302 of the IPC. No separate sentence has been awarded for offence u/S. 201 of the IPC. The appellants are original accused nos. 1 and 2 of that case.

2. According to the prosecution, deceased Kamuben was married to appellant no. 2 about six months prior to the date of present incident. The incident in question took place on 4th June, 1993. After her marriage Kamuben stayed for two days at her matrimonial home and thereafter she returned to her father's place. The house of her father is situated at a distance of about one and half kilometer from her matrimonial home. Thereafter in the month of Vaishakh as per the Hindu calendar she was again sent to her matrimonial home by performing the Ana ceremony. For bringing her back to the matrimonial home mother-in-law and sister-in-law of the deceased and other relatives had been to the house of the father of the deceased. Thereafter on the day of Bhim Agiyaras, which corresponds to 31st May, 1993, deceased and her husband i.e. appellant no. 2 had gone to the place of her father and stayed there till evening. Even prior to Bhim Agiyaras the deceased had been to her father's place and had stayed there for 2 to 3 days. According to the prosecution, the deceased while she was at her father's place, told her mother that she has being harassed by her husband and father-in-law. There she complained to her mother that she was being constantly tortured under the pretext that she was not cooking food properly and she was not doing the household work and that she was not mentally sound. It is also the case of the prosecution that while returning to her matrimonial home in the evening of Bhim Agiyaras day father of the deceased had accompanied her and at that time she had told her father that her life was in danger as the appellants wanted to kill her because she was not liked by them. It is the case of the prosecution that on 4th June, 1993 at about 9.00 a.m. while the father of the

deceased was working in his field his cousin, namely Dilip Uka came there and informed him that his daughter Kamu had fallen in the well and had died. He, therefore, immediately rushed to the house of the appellants and he was followed by his wife i.e. mother of the deceased and his sister-in-law. According to the prosecution, when these persons reached the field of appellants, the present appellants, wife of appellant no. 1 and his daughters were sitting there. The dead body of Kamuben was covered with a quilt. When the cover was lifted the father of the deceased could notice burns suffered by the deceased on her body. He, therefore, went back to Una and called his nephew Govindbhai and they thereafter again returned to the Vadi of the appellants and when they reached there, they saw that the police had already arrived at the scene and the dead body was removed to the hospital for post mortem examination. It is the case of the prosecution that appellant no. 1 had already informed the police of Una Police Station about the deceased having died of burns and, therefore, entry about accidental death at Una Police Station at serial no. 14/93 under the provisions of section 174 of the Criminal Procedure Code (for short 'Cr.P.C.') was made.

3. It is further case of the prosecution that during post mortem examination it was found that the deceased has died of strangulation and the burns received by her were all post mortem. With this information the father of the deceased approached the police and lodged FIR at about 1.30 p.m. on 5th June, 1993. The police registered offence against the present appellants at C.R. No. I - 136 of 1993 of Una Police Station for committing offence u/S. 302 read with section 114/34 of the IPC and commenced the investigation. During investigation the police recorded statements of various persons who were acquainted with the facts of the case and drew panchnamas of inquest, scene of offence, arrest of the appellants and seizure of their clothes, etc. On conclusion of the investigation, charge-sheet was submitted in the Court of the learned concerned Magistrate, who in turn committed the case to the Court of Sessions at Junagadh for trial as offence u/S. 302 of the IPC is exclusively triable by the Court of Sessions.

4. At the trial, the Ld. Sessions Judge, Junagadh on 5th June, 1995 framed charge against the appellants for offence u/Ss. 302, 201 read with section 34 or in the alternative sec. 114 of the IPC. The appellants pleaded not guilty to the charge and claimed to be tried.

5. At the trial, in support of its case the prosecution placed reliance on oral as well as documentary evidence. To establish the guilt of the appellants the prosecution examined 13 witnesses, namely-

P.W. 1 - Dr. Jashubhai Gigabhai, Medical Officer, Exh.25
P.W. 2 - Vrajlal Chhaganbhai Exh. 26
P.W. 3 - Bhikhabhai Bavbhai Exh. 29
P.W. 4 - Dhaniben Bhikhabhai Exh. 30
P.W. 5 - Manilal Bhimbhai Exh. 31
P.W. 6 - Dilipbhai Ukabhai Exh. 32
P.W. 7 - Jagabhai Bhikhabhai Exh. 33
P.W. 8 - Farid Amad at Exh. 34
P.W. 9 - Mohanbhai Parbatbhai Exh. 35
P.W. 10-Jashwantsinh Karansinh Gohil Exh. 39
P.W. 11-Bharatsinh Govindsinh Exh. 46
P.W. 12-Harishchandra Ranubha Jhala Exh. 47
P.W. 13-Bhupatsinh Devubha Vaghela Exh. 49.

It also produced documentary evidence in the form of inquest panchnama Exh.8, panchnama of scene of offence Exh. 9, post mortem notes Exh. 14, map of the scene of offence Exh. 28, etc. After recording of the oral evidence was over, all the incriminating circumstances appearing against the appellants in the evidence were put to them u/S. 313 of the Cr.P.C. From the further statements of the appellants it appears that no specific defence has been pleaded by them, but it is of general denial. Over and above that, the appellants have also submitted written statement at Exh. 52 wherein it has been stated that the deceased after her marriage had stayed for 10 to 12 days in all and during that time no harassment was caused to her. It is further stated that since the house of the father of the deceased was situated quite near to their house, deceased was very often going all alone to her father's place. On the previous day in the evening she left the house by saying that she was going to her father's place and would return next morning. Since she was granted permission by them, she had left the house. Next day in the morning everybody was busy with the routine household work but later on they noticed that some people had got collected in the field of Arjan Lava and, therefore, appellant no. 2 went there to make inquiry and saw that the dead body of the deceased was lying near the well situated in the field of Arjan Lava. They were about to send information regarding this to her father. In the meanwhile father of the deceased - Bhikhabhai with his relatives arrived there and he stayed there for some time and thereafter left. They informed the police also about this incident.

According to them the deceased had stayed at their home only for 10 to 12 days and, therefore, there was no question of their causing any harassment to her. It is further stated that appellant no. 1 (wrongly stated as accused no. 2) Vijanand Bhagwan was handicapped person and he did not have one eye and one leg. Lastly it is submitted that they have been falsely involved in this case due to suspicion.

6. At the end of the trial the Ld. Sessions Judge came to the conclusion that the prosecution was able to prove the guilt of the accused beyond any reasonable doubt and, therefore, he held them guilty of committing offence u/Ss. 302 and 201 of the IPC and sentenced them to suffer RI for life. Against that order of the Ld. Sessions Judge, the appellants have preferred this appeal.

7. Mr. Asim J. Pandya, learned advocate appearing for the appellants has submitted that there is no direct evidence available in this case to establish the guilt of the accused and the entire case hangs on circumstantial evidence. He has, therefore, submitted that the prosecution is required to prove each and every circumstance against the appellants to complete the chain so as to establish that it is the appellants alone and none else who have committed the present offence. He has further submitted that considering the evidence on record, this chain is not complete and there are several missing links on vital issues which cannot take the case of the prosecution to its logical end and prove the guilt of the appellants. He has also submitted that so far the motive is concerned, in the case of circumstantial evidence it plays an important role. However, in the present case the prosecution has not been able to establish it. He has further submitted that there is nothing on record to show that the deceased was in the company of the appellants soon before the incident took place. He has also submitted that looking to the facts involved in this case, it is quite possible that some one else may have done it and with a view to involve the appellants he might have placed the body of the deceased just near their house. Lastly he has submitted that the prosecution has not been able to establish its case against the appellants beyond any reasonable doubt and, therefore, the appellants are required to be acquitted.

7.1. As against that, Mr. I.M. Pandya, Ld. APP appearing for the respondent - State has submitted that the prosecution has established its case against the appellants beyond any reasonable doubt and the learned

trial Judge was completely justified in convicting them for offences made punishable u/Ss. 302 and 201 of the IPC. He has further submitted that considering the evidence on record, it is very clear that the appellants and the appellants alone have committed this act and they have been rightly held guilty of committing murder of Bai Kamuben. He has also submitted that the clinching circumstances like the motive, the fact regarding last seen together, the availability of opportunity to the appellants, the discovery of offending article i.e. saree, etc. have been conclusively proved by the prosecution. All these circumstances form a complete chain which would lead to the guilt of the appellants and no other hypothesis compatible with the innocence of the appellants. Lastly he has submitted that this appeal does not have any merit and hence it deserves to be dismissed. So far Mr. Asim Pandya, learned advocate for the appellants is concerned, he has placed reliance on several decisions of the Apex Court as well as of this Court, which will be referred to in the course of this judgment.

8. With a view to reappraise the entire evidence we have gone through the record of the case and we have also given our careful consideration to the rival submissions.

9. From the record it appears that there is no direct evidence available to connect the appellants with the guilt. However, there is evidence bringing on record certain circumstances on which the reliance has been placed by the prosecution in support of its case. The question therefore before us is whether these circumstances can be said to be adequate enough to come to the conclusion and the only conclusion that it is the appellants who have committed this crime.

10. Before we proceed to discuss oral as well as documentary evidence, we would first deal with the question whether the deceased died unnatural death. To establish this fact, the prosecution has placed reliance on the evidence of P.W. 1 - Dr. Jashubhai Gigabhai Exh. 25. He has stated in the examination-in-chief that the deceased had suffered two types of injuries, firstly there was a ligature of the size of 5 x 2 cms. on the neck, whose margins were not very clearly visible. However, on the right side of the neck the mark was clearly visible. The second type of injuries received by the deceased were of burns. She had sustained burns on the face, the upper portion of the waist, legs and one hand upto elbow. Her tongue was protruded and it was

burnt. He has opined that all the injuries of burns were post mortem. Only injury no. 1 i.e. ligature mark on the neck was antemortem. He has also stated that the corresponding internal injuries were to the effect that there was crushed tissue over the larynx, trachea extravasation of blood into the substances tissue trachea ring. He has further stated that there was fracture of the bone below the trachea. He has also stated that there was semi digested food in the stomach. According to him, the death was caused due to strangulation. In the cross-examination he has sated that due to the burns the signs of sexual assault on a woman or on the deceased can get destroyed.

10.1. He has produced the post mortem examination notes on record at Exh. 14. Considering the medical evidence it clearly appears that deceased had died due to strangulation. There is, therefore not difficult for us to hold that she had died unnatural death. Whether it is a case of homicide or suicide we will discuss it little later.

11. The prosecution with a view to establish that it was the appellants who have committed this crime has placed reliance on the evidence of P.W. 3 Bhikhabhai Bavbhai, who is the father of the deceased. He has stated in the examination-in-chief that his daughter Kamuben was married to the present appellant no. 2 about 2 to 3 months prior to the present incident. After marriage his daughter Kamuben was mostly staying with him, but intermittently she used to stay at her matrimonial home. He has further stated that 2 to 3 days prior to the Bhim Agiyaras his wife had brought back the deceased and she stayed there with them for about 2 to 3 days. Thereafter appellant no. 2 came with his sister and took back the deceased. On the day of Bhim Agiyaras the deceased alongwith appellant no. 2 in the morning came to his house and after spending the day with them, they started going back. The witness, therefore, accompanied them since the distance between the two houses was hardly of one and half kilometers. He has further stated that appellant no. 2 was slightly ahead of them and at that time his daughter told him that the appellants were causing harassment to her and they even gave threats to kill. He, however, persuaded his daughter to go to her matrimonial home and assured her that nothing of the sort would happen. He has further stated that on the day of incident while he was working in his field in the morning at about 9.00 a.m. his cousin Dilip Uka came there and informed him that Kamuben had died by drowning herself in the well. He, therefore,

immediately rushed to the house of the appellants. On reaching there he saw the present appellants with their other family members sitting there. The dead body was covered with a quilt and on removing the cover he found that there were severe burns on the body. He, therefore, went back and called his nephew Govindbhai. They again returned to the field of the appellants and they saw that the police had already arrived there and the body was sent for post mortem examination. On receiving the dead body from the hospital, after completion of the post mortem it was cremated and on finding that the deceased had died of strangulation, he went to lodge complaint at Una Police Station on 5th June, 1993 at about 1.30 p.m. In the cross-examination he has admitted that while narrating the harassment caused to her, his daughter had only told him that the appellants used to tell her that she was not knowing how to cook food. He has further stated that on receiving the report of the post mortem he came to know that his daughter had died of strangulation and, therefore, he suspected the appellants to be the author of the crime. He has, however, denied the suggestion made by the defence that the mental condition of the deceased was weak.

11.1. Similarly the prosecution has also placed reliance on the evidence of P.W. 4 - Dhaniben Bhikhabhai, the mother of the deceased. She has also stated in the examination-in-chief that whenever her daughter came to meet them, she used to complain about the harassment caused to her by the appellants. She has stated that the appellants used to taunt her that she did not know how to prepare Roti, vegetables and they called her insane and made her work all throughout the day. In the cross-examination she has denied that her daughter was of unstable mind. She has however, admitted that her daughter had stayed at matrimonial home at the most for 10 to 12 days. She has denied that no harassment was caused to her by the appellants.

11.2. Apart from this, the prosecution has placed reliance on the evidence of P.W. 5 - Manilal Bhimbhai and P.W. 6 - Dilip Ukabhai but their evidence does not carry the case of the prosecution any further.

11.3. P.W. 7 - Jagabhai Bhikhabhai is the panch of scene of offence. According to him, the dead body of Kamuben was lying near the well situated near the field of Arjan Lava. The soil at that place was blackened with heat and the grass was burnt. He has also stated that a can containing kerosene was lying there which was attached by the police.

11.4. P.W. 8 - Farid Amad and P.W. 9 - Mohan Parbat Exhs. 34 and 35 respectively have been examined by the prosecution as panchas of the discovery panchnama of the saree with which the appellants are alleged to have strangled the deceased. They have, however, not supported the prosecution and they have been declared as hostile witnesses. In the cross-examination by the Ld. P.P. they have denied that it was at the instance of the appellants the saree was discovered from a heap rubbish near a tree on the western side of the well in the field of appellants. Since they have admitted the signatures below the panchnama, the panchnama has been exhibited at Exh. 36.

11.5. Reliance is also placed by the prosecution on the evidence of P.W. 10 - Jashwantsinh Karansinh Gohil, who at the relevant time was working as S.D.P.O. at Keshod. He had received a wireless message regarding an accidental death of a female who had died within a period of 10 years of her marriage. He, therefore, went to Una and took over the investigation from the local Police Sub Inspector Mr. Jhala. He has produced on record the complaint given by father of the deceased, which is at Exh. 43. In the cross-examination he has stated that it was true that before he took over the investigation, he was given information with regard to accidental death alone and nothing more than that. He has also produced the entry regarding accidental death.

11.6. P.W. 12 - Harishchandra Jhala, who at the relevant time was working as Police Sub Inspector at Una, has stated that on that day at about 1.00 p.m. appellant no. 2 had informed him that his son's wife had, for some reasons, committed suicide by burning herself. He, therefore, made entry regarding accidental death at no. 14/93 and commenced inquiry into it. He has further stated that he went to the scene of offence and prepared the panchnama thereof. He has also stated that when the Dy.S.P. arrived there, he entrusted the investigation to him.

11.7. Lastly P.W. 13 - Bhupatsinh Devubha Vaghela has stated that he had recorded statements of Dhaniben and others. He had also arrested the appellants and at their instance the offending article, namely saree was discovered. He has further stated that the clothes which were seized at the time of arrest of the appellants and from the body of the deceased, were sent for laboratory examination. In the cross-examination he has denied that the discovery panchnama was already got

ready and only the signatures of the panchas were obtained at the police station.

12. In light of the aforesaid evidence, it clearly appears that Bai Kamu had died of strangulation and thereafter somebody had set the body ablaze. The prosecution's endeavour to establish that it was the appellants, who had done this and the circumstances brought on record for that purpose do not form a complete chain of circumstantial evidence which can be used to fix the guilt of the appellants. So far the motive is concerned, though the prosecution witnesses Bhikhabhai and Dhaniben have stated that the appellants did not like the deceased and for that reason she was constantly being harassed and on some occasions even threats were given to her by the appellants. However, this does not seem to be plausible. It is almost an admitted fact that within a span of six months the deceased had hardly stayed for about 10 to 12 days in all at her matrimonial home; intermittently staying there for 2 to 3 days on 3 to 4 occasions. Most of the time she has remained with her parents. It is, therefore, very difficult to hold that within such a short time the appellants would develop so much of disliking for her that they would go to the extent of killing her. In fact so far the threats regarding the killing is concerned, it is only Bhikhabhai who says so. P.W. Dhaniben is completely silent on this point. Dhaniben has merely stated that the appellants used to tell the deceased that she was not cooking food properly and that she was insane. In fact the say of the father of the deceased is that the deceased told about threat given to her by the appellants only when they were going to the house of the appellants on Bhim Agiyaras. It may be noted that at that time the appellant no. 2 was very much there, but he was walking slightly ahead of them. It is very unnatural that when the deceased had opportunity available to her earlier to reveal this fact to her father, she had not done it and she revealed this fact only when they were in the company of the appellant no. 2. It, therefore, appears that the father has developed this story with a view to falsely implicate the appellants. It may also be noted here that appellant no. 1 is the father-in-law of the deceased. There is, therefore, no question of his liking or not liking the deceased. It is on record that he is a handicapped person having only one leg and one eye. It becomes, therefore, very doubtful whether he entertained any such intention in respect of the deceased. In these circumstances, we find that the prosecution has not been able to prove the aspect of motive.

13. So far the circumstance regarding the deceased being in the company of the appellants just before the incident is concerned, there is no evidence at all on record. It is the say of the father and mother of the deceased that in the evening of Bhim Agiyaras deceased had gone to her matrimonial home. On verifying from the almanac of the relevant year, it appears that the corresponding date on that day was 31st May, 1993. The incident took place on 4th June, 1993. What happened during 4 intervening days is not known since there is no eye witness and no other evidence has been led by the prosecution on that count. It is the say of the appellants in their further statements that immediately on the next day the deceased had returned to her father's place after obtaining permission and it was only on the 4th day they came to know that her body was lying near the well. There is no evidence on record to counter the say of the appellants. In absence of any such evidence, it is very difficult to hold that for all these 4 days the deceased had stayed at the house of the appellants and ultimately on the night between 3rd and 4th June, 1993 the appellants had committed her murder. It cannot be forgotten that the deceased was in the habit of going away to her parents' home off and on and, therefore, there is some possibility that she might have left the matrimonial home next day as per the say of the appellants. Be as it may. Since there is nothing on record which speaks about the presence of the deceased at the house of the appellants between 31st May, 1993 and 4th June, 1993 we are unable to hold that the deceased was with the appellants just before the incident in question took place. In other words, since there is no evidence to hold that the deceased was last seen in the company of the appellants, we hold that the prosecution has miserably failed to prove this aspect of its case.

13.1. So far the strangulation is concerned, since there is no direct evidence as to who did it and by what means, it is possible to draw a conjecture that it might be the deceased who might have committed suicide on account of what she felt as harassment from the appellants or for any other reason and the appellants realising that they might be in deep trouble, they might have tried to destroy the body by burning it. Since there is nothing on record to show as to at what time and how all this happened and who did it, it is very difficult for us to hold with certainty that it is the appellants who have done it and that too in the early hours of 4th June, 1993. However, we are not entering into that controversy since we are satisfied that there is no evidence to hold that the appellants are the

authors of the act resulting into the death of the deceased. It may also be noted here that so far the silken saree by means of which the appellants are alleged to have strangled the deceased is concerned, the panchas have not supported the prosecution and they have denied the contents of panchnama. In that view of the matter, though the panchnamas have been exhibited, they cannot be of any help of the prosecution. When the panchas denied the fact that it was at the instance of the appellants the saree was discovered, the contents of the panchnama will not come to the aid of prosecution. In that view of the matter, there is no evidence on record to support the say of the prosecution that the appellants had strangled the deceased by means of a saree. When these important links are missing from the chain of circumstances, by no means it can be said that the chain is complete and the guilt of the appellants is established beyond doubt. We are, therefore, unable to agree to the submission made by Mr. I.M. Pandya, Ld. A.P.P. that all the vital links forming the chain of circumstantial evidence are available on record and they clearly involve the appellants in the present case. Mr. A.J. Pandya has placed reliance on the well known case on circumstantial evidence, namely, Sharad Sarda v/s. State of Maharashtra reported in AIR 1984 S.C. at page 1622. He has also placed reliance on the decision of the Apex Court rendered in the case of Tanviben Divetia v/s. State of Gujarat reported in 1997 (2) G.L.R. at page 1346. He has also placed reliance on the decision rendered by the Division Bench of this Court in the case of Darji Bachu Tapu v/s. State of Gujarat reported in 1992 (2) G.L.R. at page 1557. All these decisions laid down the golden principle of circumstantial evidence regarding the completion of the chain which may point to the guilt of the accused eliminating any other hypothesis. We are completely in agreement with the ratio laid down by the Apex Court and this Court in the aforesaid decisions. It is very clear that the prosecution in this case has failed to successfully travel the distance between 'may be' and the 'must be' and, therefore, we are unable to agree with the conclusion reached by the trial Court holding the appellants guilty of committing offence u/Ss. 302 and 201 of the IPC. The said finding of the trial Court is required to be set aside.

14. We, therefore, conclude that the prosecution has failed to establish its case against the present appellants beyond reasonable doubt and, therefore, they deserve to be acquitted. In the result this appeal is allowed. The appellant no. 1, who has

already been released on bail by this Court vide order dated 7/11/1995, is not required to surrender to the custody and his bail bonds stand cancelled. The appellant no. 2 is directed to be set at liberty forthwith, if not required for any other purpose.

So far the aforesaid Misc. Criminal Application filed by the appellant no. 2 to release him on bail pending final disposal of this appeal is concerned, no orders are required to be passed in view of the fact that this appeal is now finally disposed of.

[M. H. KADRI, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.